IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI,	)	
Plaintiffs,	)	
v.	)	
STATE OF TEXAS; RICK PERRY, In His Official Capacity As Governor Of The State of Texas; DAVID DEWHURST, In His Official Capacity As Lieutenant Governor and Presiding Officer Of the Texas Senate,	)	CIVIL ACTION NO. L-03-113
Defendants.	)	

PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, pursuant to Rule 65, Federal Rules of Civil Procedure, hereby apply to this Court for entry of a temporary restraining order. As grounds for this application, plaintiffs assert several bases for the requested relief: 1) that defendants have administered unprecleared changes in voting "standards, practices and procedures" in violation of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c; 2) that defendants' actions in imposing certain fines and sanctions violate various provisions of the United States Constitution; and 3) that defendants' conduct is unconstitutionally motivated by race in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution

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Plaintiffs respectfully submit the attached Memorandum of Law, which is incorporated by reference herein.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs respectfully submit this Memorandum of Law in Support of the foregoing Application for a Temporary Restraining Order.

I. The Court Should Grant a Temporary Restraining Order Barring The Administration of the Unprecleared Changes Under Section 5 of the Voting Rights Act.

Plaintiffs have brought before this Court a multi-count complaint alleging violations of the Voting Rights Act and the United States Constitution. Plaintiffs have moved for a preliminary injunction alleging that certain changes administered by the defendants have been administered in violation of the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. In support of this Application, plaintiffs hereby incorporate the arguments made in their preliminary injunction and supporting memorandum, as well as the exhibits

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attached thereto. In addition to the points and authorities set forth in plaintiffs' motion for preliminary injunction, plaintiffs submit sworn Declarations of the plaintiffs that are attached to this Application. Those sworn Declarations make clear that the defendant Lieutenant Governor David Dewhurst expressly agreed that he would abide by and uphold the supermajority 2/3 Rule in the Texas Senate once he took office. Dewhurst said "that when he took office, he would continue the tradition of honoring the two-thirds rule." See Exhibits A-F, attached hereto.[1]

In accordance with the provisions of 42 U.S.C. §1973c and 28 U S.C. §2284, a three-judge court would be required to hear and determine a motion for preliminary injunction and the ultimate adjudication of this action. However, due to the urgency of this matter, plaintiffs respectfully request a single judge to hear this application for a temporary restraining order as provided for in 28 U.S.C. §2284(b)(3).

II. The Court Should Grant a Temporary Restraining Order or a Preliminary Injunction Barring Summary Imposition by Defendants of Illegal and Excessive Fines.

The Defendants' unauthorized attempt to impose coercive, excessive fines on the Democratic Senators threatens severe constitutional harms and must be enjoined immediately. As with a preliminary injunction, the Court must issue a temporary restraining order where a plaintiff demonstrates "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3)

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[1] These sworn Declarations are also important in assessing the legality of the fines, penalties, and threats of arrest imposed on these plaintiffs. See pp. 4 through 12, *infra*. Plaintiffs agreed to the Senate Rules when those Rules were adopted at the start of the 2003 legislative session with the clear understanding that the 2/3 Rule would be honored. When that tradition was dishonored and the promise to abide by it was broken by defendant Dewhurst, the plaintiffs left Texas in order to deprive the Texas Senate of a quorum. The Senate Rules these senators approved at the start of the 2003 session had no provisions for fining or punishing absent senators, and in any event, were approved by these plaintiffs only with the understanding that the 2/3 Rule would remain in effect. Even though the Senate Rules as adopted at the start of the 2003 session did include a provision authorizing the sergeant at arms to arrest absent senators, that provision was agreed upon only as part of a package of Rules and traditions of the Texas Senate that included the 2/3 Rule.

that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the [requested relief] will not disserve the public interest." *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003); *see also* Fed. R. Civ. P. 65(b). Plaintiffs here easily meet this test.

First, Plaintiffs are likely to prevail on their constitutional claims. Lacking any valid authority, the Defendants have purported to inflict novel, unlawful penalties on the Democratic Senators. These unauthorized fines constitute a quintessential due process violation, one that is magnified substantially by the excessive nature of the penalties. In addition, the new fine scheme targets specific individuals and is therefore an unconstitutional bill of attainder. Second, Plaintiffs will suffer irreparable harm absent a temporary restraining order. Because the daily fines are so severe, they effectively coerce the Democratic Senators into returning to the state and forgoing any opportunity for meaningful judicial review. As the Supreme Court has made clear, a court should enjoin the imposition of excessive fines pending review, regardless of the ultimate outcome of plaintiffs' underlying challenge. Finally, neither the Defendants nor the public has any interest in the enforcement of unauthorized punitive measures instituted simply to punish the Defendants' political opponents.

The Defendants basis for imposing these fines and sanctions was that the plaintiffs had left the State of Texas and by those actions denied the Texas Senate of a quorum. But when the plaintiffs-senators agreed to the Senate Rules, they did so with the clear understanding that the 2/3 Rule would be in effect. This understanding was based on an explicit agreement between defendant Lieutenant Governor David Dewhurst and these plaintiffs reached at a meeting prior to the start of the 2003 regular session. See exhibits A to F hereto. In that meeting, the plaintiffs-

senators were informed that that the 2/3 Rule would continue to be an honored tradition in the Texas Senate and that Defendant Dewhurst would honor it. In exchange, Defendant Dewhurst sought and obtained an agreement that the powers of the Lieutenant Governor, as presiding officer of the Texas Senate, would not be changed. When Defendant Dewhurst changed the Rules that had been expressly agreed upon, these plaintiffs exercised the only right they had left to deal with the situation.

III. The Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional Claims.

A. The Unauthorized and Excessive Fines Violate Plaintiffs' Due Process Rights.

Unable to achieve their goals through the lawful exercise of pre-existing authority, and lacking the necessary quorum to expand that authority, the Defendants acted *ultra vires* and have imposed punitive, coercive fines on the Plaintiffs. This brazen act violates a core guarantee of the Due Process Clause, U.S. Const. amend. XIV, inflicting severe penalties on the Democratic Senators without any lawful basis. As the Supreme Court explained in a related context, "It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954). Indeed, the essence of due process protection demands that the government follow established, clear procedures – pursuant to lawful authority – before meting out severe deprivations or punishments. The challenged fines contravene this fundamental constitutional precept.

1. The Defendants Lacked Authority to Impose Any Fines on Plaintiffs.

Although legislatures generally have the ability to set internal rules and procedures without judicial involvement, a legislature plainly "may not by its rules ignore constitutional

restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892). That means that courts must be open to review any exercise of legislative power, purportedly based on a legislative rule, where the affected party claims the legislative action violates the Constitution. For example, in *Powell v. McCormack*, 395 U.S. 486, 550 (1969), the Supreme Court invalidated a resolution by U.S. House of Representatives that had sought to exclude an elected Congressman from membership in the House. Rejecting arguments seeking to insulate the legislature's actions from judicial scrutiny, the Court in *Powell* held that the House's delegated power to punish members pursuant to Article I, sec. 5 of the U.S. Constitution was necessarily limited by other independent constitutional provisions. *Id.* Similarly, Plaintiffs' constitutional claims in this case require an analysis of the Texas Senate's rules to determine whether, in fact, the Defendants had any legal basis for fining the Democratic Senators. Analysis of those rules makes clear that the Defendants far exceeded their lawful authority and, consequently, violated Plaintiffs' due process rights.

The Texas Constitution provides that "[t]wo-thirds of each House [of the Texas Legislature] shall constitute a quorum to do business," and allows each House to "compel the attendance of absent members, in such manner and under such penalties as each House may provide." Tex. Const. art. III, § 10. Pursuant to that authority, the State Senate – lawfully convened with the requisite quorum present – enacted specific rules prescribing the precise "manner" in which it would "compel the attendance of absent manners." In their current form, those rules allow for only one means (other than informal political compromise and conciliation) of compelling attendance at legislative sessions: arrest of the absentee Senators by the Sergeant-at-Arms. *See* Tex. Sen. Rules 5.02, 5.04.

Senate Rule 5.04 sets forth the procedure for "a call of the Senate . . . to secure and maintain a quorum" necessary for the consideration of pending bills. That rule states in relevant part:

> The Secretary shall call the roll of members and note the absentees. Those for whom no sufficient excuse is made, by order of the majority of those present, may be sent for and arrested wherever they may be found and their attendance secured and retained by the Sergeant-at-Arms or officers appointed by the Sergeant for that purpose. The Senate shall determine upon what conditions they shall be discharged.

Tex. Sen. Rule 5.04; *see also id.* 5.02 ("Two-thirds of all the Senators elected shall constitute a quorum, but a smaller number may adjourn or recess from day to day and compel the attendance of absent members (Constitution, Article III, Section 10). In case a less number shall convene, the members present may send the Sergeant-at-Arms or any other person or persons for any or all absent members.").

As passed unanimously by the full Senate on January 16, 2002, *see* Senate Resolution 16, the current Senate Rules thus grant a non-quorum group of Senators – like the Defendants at their August 12, 2003 meeting – only one means of compelling attendance by absent Senators, namely, arrest by the Sergeant-at-Arms. If the full Senate had wished to expand the ability of its members to enforce a call on the Senate in the absence of a quorum, it could have done so under the Senate's rules governing amendments (which require that a quorum be present before passage of any amendments). *See, e.g.*, Tex. Sen. Rules 22.01 (amendments to rules); 8.02 (resolutions to amend rules); 16.09 (limited exceptions to quorum requirement). Having declined this option, however, the Senate specifically limited the authority of non-quorum sessions to compel attendance.

The Defendants apparently seek to justify their unauthorized action by characterizing the fines as mere enforcement mechanisms that are ancillary to the Defendants' power to seek an

arrest of absentee Senators. *See* Senate Rule 5.02 and 5.04 (describing payment as "a condition of discharge" of the arrest order issued on July 28, 2003); Letter of Attorney General Abbot to Lt. Gov. Dewhurst, Aug. 12, 2003, with attached memorandum (relying on provision in Rule 5.04 stating that "[t]he Senate shall determine upon what conditions [arrested absentee Senators] shall be discharged"). This strained justification is unavailing for two reasons. First, given the severe, unique burdens imposed by the excessive fines, they necessarily inflict a penalty wholly distinct from the threat of arrest within the State of Texas. It strains logic and reason to assume that the Senators at a non-quorum session can set *any* condition on the return of absentee Senators, however extreme and attenuated. Under the Defendants' apparent theory, present Senators could condition the discharge of an arrested absent Senator on the latter's forfeiture of an entire year's (or lifetime's) salary, on the absent Senator's promise to vote a particular way on a pending bill, on the absentee's resignation from the Senate, etc. Second, even if the fines theoretically could be linked properly to an arrest by the Sergeant-at-Arms, Rule 5.04 allows only "the Senate" to prescribe such conditions. Rule 5.04 plainly distinguishes among the powers of "the majority of those present" at a non-quorum meeting, the powers of "the Secretary," and those of "the Senate": the Secretary "shall call the roll of members and note the absentees; the majority of those present can vote to have the absent Senators arrested by the Sergeant-at-Arms; but *only the Senate* – with a full quorum, as contemplated throughout the Senate Rules – "shall determine upon what conditions" the arrested absentees "shall be discharged." Tex. Sen. Rule 5.04.

The fines imposed by the Defendants, therefore, were plainly *ultra vires*.

2. The Excessive Nature of the Fines Exacerbates the Due Process Violation.

Because the fines imposed on the Democratic Senators were unauthorized, they

necessarily would violate Plaintiffs' due process rights, regardless of the magnitude of the fines. The excessive nature of those fines, however, amplifies the constitutional harm. "The Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 444-45 (1993) (internal quotation marks omitted). As the Supreme Court explained this Term, "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003); *see also, e.g., BMW of Amer., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *see also id.* at 587 (Breyer, J., concurring) (the constitutional prohibition on grossly excessive punishment, "itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion"). The fines challenged here, which will be as much as $5,000 per day as of Sunday, August 17, 2003, far exceed the bounds of reasonableness.

In fact, the fines are so extreme and coercive that they could compel the Democratic Senators to return to the State and abandon their current legal challenge. As noted above, Plaintiffs believe that the Defendants have acted unconstitutionally; yet if Plaintiffs maintain their political and legal stance, staying in New Mexico pending the outcome of this litigation, they face the possibility of owing tens of thousands of dollars to the Senate. Indeed, the Defendants' stated purpose is to achieve that very result, which would force Plaintiffs to forgo their right to meaningful judicial review of the Defendants' actions.

The Constitution forbids such action. As the Supreme Court has made clear in a series of cases dating back to *Ex parte Young*, 209 U.S. 123 (1908), this sort of coercion is an independent due process violation, irrespective of the merits of a plaintiff's underlying challenge. In *Ex Parte*

Young, the Court held that state statutes prescribing maximum rail rates, and establishing large penalties for violations of those rates, were unconstitutional because the severity of the threatened penalties effectively denied plaintiffs any meaningful opportunity for review. *Id.* at 145-48. The Court held that "the provisions of the acts relating to the enforcement of the rates, . . , by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, *without regard to the question of the insufficiency of those rates.*" *Id.* at 148 (emphasis added); *see also, e.g.*, *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 337 (1920) ("Obviously a judicial review beset by such deterrents [daily fines of $500 for noncompliance with challenged rates order] does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional *without regard to the question of the insufficiency of those rates.*") (emphasis added); *id.* (granting temporary injunction restraining state agency from enforcing penalties). Similarly, absent an immediate injunction or restraining order by this Court, the excessive fines imposed on the Democratic Senators would violate Plaintiffs' due process rights by coercing them into abandoning any potential redress in the courts.

B. The Fines Are an Unconstitutional Bill of Attainder.

The fines impermissibly single out an identifiable group for punishment, in violation of the constitutional prohibition on bills of attainder. *See* Art. I, § 10 ("No State shall . . . pass any Bill of Attainder."). "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United*

States v. Lovett, 328 U.S. 303, 315 (1946).[2] Here, the constitutional infirmities are more egregious, and the prospects for Plaintiffs' success more likely, given that the challenged bill of attainder expressly targets the Defendants' political adversaries in the midst of a heated partisan dispute.

C. The Fines Are Designed to Punish the Exercise of First Amendment Rights

It is well established that the actions of legislators in carrying out their office are protected from governmental regulation by the First Amendment. *See, e.g., X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 69-70 (2d Cir. 1999); *Clarke v. United States*, 886 F.2d 404, 411-12 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990); *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989); *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667 (W.D. Wisc. 1983). One of the tools available to legislators in Texas, when they are opposing what they perceive as abusive acts by a majority of their colleagues, is to stay away from the floor and prevent a quorum from existing. The only limit on that tool is the one stated in the rules – the possibility of arrest. Unless and until the Senate validly votes to impose a different rule effectively making it prohibitively expensive to utilize this weapon against majority abuses, an attempt by the majority to impose unauthorized and severe financial penalties is also a violation of the First Amendment.

D. The Defendants' Actions, through Arrest by the Senate Sergeant-at-Arms Pursuant to a Call on the Senate, in order to Compel the Plaintiffs' Attendance to Form a Quorum of the Senate During a Special Session of the Legislature Violates the Plaintiffs' First Amendment right to freedom of speech.

The current actions of the Plaintiffs in refusing to attend special sessions of the legislature

[2] *Lovett* invalidated a bill by Senator Joe McCarthy, which had sought to bar certain individuals from government employment on the basis of their political views. *Lovett*, 328 U.S. at 315. Although *Lovett* addressed the constitutional provision barring federal bills of attainder, U.S. Const. art. I, § 9, the provision applicable to the states

– called by the Governor for the purpose of congressional redistricting and administered by the Lieutenant Governor without observance of the traditional two-thirds rule only insofar as congressional redistricting is concerned – plainly constitute the most fundamental kind of political speech. Under the current circumstances, any action compelling the attendance of the Plaintiffs is tantamount to forcing a vote *for* a redistricting plan the Plaintiffs oppose – and have opposed from the inception of this unprecedented mid-decade undertaking. An arrest by the Sergeant-at-Arms, therefore, is state action compelling the Plaintiffs to act directly contrary to their political beliefs. Political speech lying at the very core of the First Amendment is what is at stake.

Thus, *as applied to the specific facts present in this unique circumstance*, deployment of Senate Rules 5.02 and 5.04 to effectuate the arrest of the Plaintiffs flies directly in the face of their First Amendment rights under the United States Constitution. This would violate fundamental understandings of the rights and privileges of legislators reaching back four centuries. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (legislative immunity case noting that the "privilege of legislators to be free from arrest ... for what they do ... in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries"). As Justice Frankfurter pointedly observed in his opinion for the Court in *Tenney v. Brandhove*, "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Id.* at 372.

It is no answer to the Plaintiffs' assertions of First Amendment rights that they are legislators, with less protection than citizens who follow other pursuits. In *Bond v. Floyd*, a unanimous Supreme Court overturned the Georgia Legislature's expulsion of State

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and relevant in this case, *id.* art. I., § 10, is identically worded.

Representative Julian Bond because of his public opposition to the war in Vietnam. 385 U.S. 116 (1966). The Court held that the expulsion violated Representative Bond's First Amendment rights. It made no difference that the expulsion was painted as simply an internal matter that the Georgia Legislature could handle for itself. The Court flatly rejected Georgia's argument that, even though punishing a citizen for such speech would violate the First Amendment, "the State may nonetheless apply a stricter standard to its legislators." 385 U.S. at 132-33 ("We do not agree").[3] The Court explained what should be obvious to all: "The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." 385 U.S. at 136. Bond was reinstated in the legislature.

The Plaintiffs in the case before the Court are engaged in First Amendment activity of the same sort exercised by Julian Bond. Their presence in Albuquerque, and their absence from the special session of the legislature, is a statement that the effort now underway to force congressional redistricting through the process is diametrically opposed to their political position and the interests of the constituents who elected them. The only purpose for arresting them is to complete passage of the redistricting bill and override their opposition to it. Using the Senate Rules to effectuate arrests is, as applied to the facts here, barred by the First Amendment's protection of the core political speech now being voiced by the Plaintiffs.

E. The Decision To Abandon the 2/3 Rule Will Harm Minority Voters and Their Representatives in Violation of Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act, 42 U.S.C. §1973, protects minority voters by prohibiting any action that denies or abridges the right of minority voters to participate effectively in the political process and to elect candidates of their choice to office. Actions

[3] A court from the Southern District of Texas, in fact, has recognized that private citizens have a right not to vote. "[T]here is also a right not to vote." *Beare v. Smith*, 321 F.Supp. 1100 (S.D. Tex. 1971). Under the Supreme

targeting these senators, who represent districts protected under the Voting Rights Act and who represent the vast majority of minority voters in the State, is a form of invidious discrimination that violates Section 2. When a certain practice or law causes an inequality in the opportunities enjoyed by minority voters, a violation of Section 2 is established. Although discriminatory results are sufficient to demonstrate a violation of Section 2, see *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), the actions taken here--targeting minority legislators and those senators who represent the only minority opportunity districts in the State and taking away from them the protections of the 2/3 Rule--constitute invidious discrimination violative of Section 2.

Finally, we note that congressional maps that have been proposed thus far in the Texas Senate are harmful to minority voters in the State. See, *e.g.*, Exhibit __ (Report of Dr. Allan Lichtman submitted to Senate Jurisprudence Committee regarding one of the proposed plans in the Senate). Because the proposed congressional maps threaten to weaken minority voting rights throughout the State, the protection of the 2/3 Rule is the only weapon available to the minority voters and their elected representatives to insure that they can continue to participate effectively in the political process and that their voting rights will be protected during the redistricting process.

F. The Decision To Abandon The 2/3 Rule Is Also Unconstitutional Under the Fourteenth and Fifteenth Amendments Because It Is An Act Of Intentional Discrimination

This is an act of invidious discrimination by a government official. Dewhurst is not only aware that the abandonment of the 2/3 Rule will allow the Senate to run over minority senators and their constituents on the issue of congressional redistricting, he is taking that action because it will have that desired effect. Governor Dewhurst has stated publicly, for example, that the

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Court's rationale in *Bond*, the plaintiffs have no less of a right.

Democrats in the Senate need to fact the fact that there eventually will be a new congressional redistricting bill passed out of the Senate. The decision to force senators to return to the senate without the protections of the 2/3 Rule is motivated by a racially discriminatory purpose.

The decision of the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 244 (1977), provides the analytical framework for determining under the Equal Protection Clause whether the defendants' abandonment of the 2/3 Rule is impermissibly motivated by an invidious and discriminatory purpose. In that case, the Supreme Court laid out several factors to guide courts in determining whether a challenged decision or action was intentionally discriminatory. The Court wrote:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it "bears more heavily on one race than another," *Washington v. Davis, supra*, 426 U.S. at 242, 96 S. Ct. at 2049 may provide an important starting point.
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> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See Lane v. Wilson, supra; Griffin v. School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed2d 256 (1964); Davis v. Scnekk, 81 F. Supp. 872 (S.D. Ala.) aff'd per curiam, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed.1093 (1949); Keyes v. School District No. 1, Denver, Colo., supra, 413 U.S. at 207, 93 S.Ct. at 2696. The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. Reitman v. Mulkey, 387 U.S. 369, 373-376, 87 S.Ct. 1627, 1629-1631, 18 L.Ed.2d 830 (1967); Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936). ....Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
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> The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

Village of Arlington Heights, supra, at 266 (footnote omitted).

The only reasonable inference that can be drawn in assessing the defendants' decision to

change from a 2/3 Rule to a simple majority, when considered against the *Arlington Heights* factors, is that it is an act of invidious discrimination. The decision will "bear more heavily on one [racial group] than another." *Id.* The decision will impact exclusively only those senators who presently represent the only majority-minority districts in the State of Texas (9 minority and 2 Anglo senators). These 11 senators include the only minority legislators in the Texas Senate. Each of the eleven districts they represent is a district drawn to comply with the Voting Rights Act. There is evidence that these 11 senators desire to invoke the protections of the 2/3 Rule See Exhibits 1-11.

Second, the sequence of events that led up to Dewhurst's decision to drop the 2/3 Rule is highly suspect and suggestive of racial purpose. Dewhurst just a month ago agreed that a 2/3 Rule would be in effect for the first special session. Before that, he employed use of the 2/3 Rule in the 2003 regular session. Moreover, he had even struck an agreement with these plaintiffs that the 2/3 Rule would be honored, without exception. That sequence of events shows a strong adherence to the 2/3 Rule and makes the decision to abandon the 2/3 Rule in the second session inexplicable on any other grounds other than race. While Dewhurst might claim that his goal is to hurt Democrats, not minorities, the fact of the matter is that all of the 11 Democrat represent the only minority opportunity Senate districts in the State of Texas.

Third, it is departure from the procedural norm for the Texas Senate not to have a 2/3 Rule. During the last twenty years, for example, the defendants have strictly adhered to the 2/3 Rule in considering congressional redistricting. The 2/3 Rule, with one exception, has been used in every regular session and in every special session when congressional redistricting was considered. Moreover, in those rare instances when a 2/3 Rule was not employed for matters outside congressional redistricting, it was done without a single senator registering an objection

to the lack of a 2/3 Rule. Thus, the prior procedural norm has been to use a 2/3 Rule, and the decision now not to have one is a strong indication that the Lieutenant Governor's actions are motivated by racially discriminatory purposes.

The fact that in each and every instance where the State has considered congressional redistricting over the last thirty years the Senate has employed a 2/3 Rule shows that the State "strongly favor[ed]" a congressional redistricting policy that used the supermajority requirement of a 2/3 Rule. This long-standing state policy stands in sharp contrast to the decision in 2003 not to use the 2/3 Rule in the second special session. Put another way, that the Texas Senate would abandon the 2/3 Rule now represents a sharp substantive departure from its past policies, and this too is powerful evidence that racial invidiousness underlies the decision to abandon the 2/3 Rule.

III. Plaintiffs Will Suffer Irreparable Harm Absent A Temporary Restraining Order.

Plaintiffs are threatened with irreparable harm in this case. This Court can preserve the status quo ante by restoring the 2/3 Rule so that these senators can return to Texas. Plaintiffs desire to do so, but their rights under the Constitution and the Voting Rights Act must be protected. Plaintiffs cannot be forced to return under conditions that forego their rights to equal treatment under the law and waive their rights under the Voting Rights Act. If they do, the defendants will trample on the rights of minority voters.

With regard to the fines and other penalties that defendants have threatened these plaintiffs with, consider the choice these plaintiffs are faced. The magnitude and immediacy of the fines present Plaintiffs with a Hobson's choice: They must either forsake their legal challenge to the Defendants' actions, or risk incurring substantial and potentially debilitating debt. Their presence on the senate floor and the ability to represent their constituents is

threatened because the payments of all fines and penalties is a prerequisite to the restoration of their full voting rights as a senator. As discussed above, *infra* Part I.A.2, the due process bars the imposition of such severe fines, regardless of the merits of Plaintiffs' underlying constitutional challenge. *See, e.g.*, *Love*, 252 U.S. at 340; *Ex parte Young*, 209 U.S. at 148. Because the immense fines effectively coerce Plaintiffs into abandoning any right to meaningful judicial review, Plaintiffs are threatened with irreparable harm in this case. Accordingly, the Court should issue a temporary restraining order to preserve the *status quo* pending ultimate consideration of the lawfulness of the fines.

IV. Issuance of a Temporary Restraining Order Will Serve the Public Interest and Will Not Unduly Harm Defendants.

Dissatisfied with the available legal and political means of resolving the current partisan dispute, Defendants have unlawfully invoked the power of the State to impose severe punitive fines on their political adversaries. If the Court allows the Defendants' actions to stand, the public faith in our basic democratic institutions will reach a new low. The public interest can be served here only if the Court prevents the Defendants from violating Plaintiffs' constitutional rights, at least pending the Court's more searching review of the issues at hand. Relatedly, Defendants can hardly claim any interest in enforcing their *ultra vires* activity and subverting the pre-existing legislative rules through unauthorized, unconstitutional punishment of the Senate Democrats.

CONCLUSION

For the reasons stated above, this Court should grant the requested temporary restraining order and preliminary injunction.

Respectfully submitted,

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Of counsel:

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By: _____
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SBN: 22241000
FBN: 5620

_____
Guadalupe Castillo
SBN: 03985500

DECLARATION OF JOHN WHITMIRE

Pursuant to 28 U.S.C. §1746, I, John Whitmire declare that:

1. My name is John Whitmire I reside in Harris County, Texas, in Texas Senate District 15. I am the duly elected Senator from Texas Senate District 15, and have held that office continuously since 1983.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26 day of August, 2003.

JOHN WHITMIRE

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF Bernalillo §

Before me, the undersigned notary, on this day appeared JOHN WHITMIRE, a person whose identity is known to me. After I administered an oath to him, upon oath he said that he has read the Declaration and the facts stated in it are within his personal knowledge and are true and correct.

John Whitmire

Sworn to and subscribed before me by John Whitmire on August 26, 2003.

Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006

DECLARATION OF ELIOT SHAPLEIGH

Pursuant to 28 U.S.C. §1746, I, Eliot Shapleigh declare that:

1. My name is Eliot Shapleigh I reside in El Paso County, Texas, in Texas Senate District 29. I am the duly elected Senator from Texas Senate District 29, and have held that office continuously since 1997.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate.
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26th day of August, 2003.

ELIOT SHAPLEIGH

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF Bernalillo §

Before me, the undersigned notary, on this day appeared ELIOT SHAPLEIGH, a person whose identity is known to me. After I administered an oath to him, upon oath he said that he has read the Declaration and the facts stated in it are within his personal knowledge and are true and correct.

Eliot Shapleigh

Sworn to and subscribed before me by Eliot Shapleigh on August 26, 2003.

Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006

DECLARATION OF GONZALO BARRIENTOS

Pursuant to 28 U.S.C. §1746, I, Gonzalo Barrientos, declare that:

1. My name is Gonzalo Barrientos. I reside in Travis County, Texas, in Texas Senate District 14. I am the duly elected Senator from Texas Senate District 14, and have held that office continuously since 1985.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate.
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26 day of August, 2003.

Gonzalo Barrientos

GONZALO BARRIENTOS

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF Bernalillo §

Before me, the undersigned notary, on this day appeared GONZALO BARRIENTOS, a person whose identity is known to me. After I administered an oath to him, upon oath he said that he has read the Declaration and the facts stated in it are within his personal knowledge and are true and correct.

Gonzalo Barrientos

Sworn to and subscribed before me by Gonzalo Barrientos on August 26, 2003.

Erin Rogers
Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006

DECLARATION OF MARIO GALLEGOS, JR.

Pursuant to 28 U.S.C. §1746, I, Mario Gallegos, Jr., declare that:

1. My name is Mario Gallegos, Jr. I reside in Harris County, Texas, in Texas Senate District 6. I am the duly elected Senator from Texas Senate District 6, and have held that office continuously since 1995.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate.
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26 day of August, 2003.

Mario Gallegos Jr.

MARIO GALLEGOS, JR.

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF Bernalillo §

Before me, the undersigned notary, on this day appeared MARIO GALLEGOS JR., a person whose identity is known to me. After I administered an oath to him, upon oath he said that he has read the Declaration and the facts stated in it are within his personal knowledge and are true and correct.

Mario Gallegos, Jr.

Sworn to and subscribed before me by Mario Gallegos, Jr. on August 26 2003.

Erin Rogers
Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006

DECLARATION OF JUDITH ZAFFIRINI

Pursuant to 28 U.S.C. §1746, I, Judith Zaffirini declare that:

1. My name is Judith Zaffirini I reside in Webb County, Texas, in Texas Senate District 21. I am the duly elected Senator from Texas Senate District 21, and have held that office continuously since 1987.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate.
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26th day of August, 2003.

Judith Zaffirini

JUDITH ZAFFIRINI

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF _____ §

Before me, the undersigned notary, on this day appeared JUDITH ZAFFIRINI, a person whose identity is known to me. After I administered an oath to her, upon oath she said that she has read the Declaration and the facts stated in it are within her personal knowledge and are true and correct.

Judith Zaffirini
Judith Zaffirini

Sworn to and subscribed before me by Judith Zaffirini on August 26, 2003.

Erin Rogers
Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006

DECLARATION OF LETICIA VAN DE PUTTE

Pursuant to 28 U.S.C. §1746, I, Leticia Van de Putte, declare that:

1. My name is Leticia Van de Putte. I reside in Bexar County, Texas, in Texas Senate District 26. I am the duly elected Senator from Texas Senate District 26, and have held that office continuously since 1999.
2. In late November or December, 2002, the Senate Democratic Caucus convened a meeting in Austin, Texas, at the Four Seasons Hotel. I was present, along with most of the Democratic Senators of the Texas Senate.
3. David Dewhurst, at that point Texas Lieutenant Governor-elect, and Rob Johnson, Jr., one of his aides, along with another aide for Mr. Dewhurst, joined the meeting at one point.
4. During the part of the meeting at which he was present, Mr. Dewhurst inquired of the Caucus members present whether they anticipated seeking substantive changes to the then-existing rules of the Senate. (Among other things, these Senate Rules are, and traditionally have been, the source of authority for the Lieutenant Governor to serve as the presiding officer of the Senate.) Caucus members replied that they were not contemplating substantive changes to the Senate Rules.
5. Mr. Dewhurst then addressed his view on the traditional two-thirds rule that had been observed in the Senate by its presiding officer. He said that, when he took office, he would continue the tradition of honoring the two-thirds rule. He then added that, in a situation in which he or the Senate sensed that the vote on a measure might be close under the two-thirds rule, he might in some situations allow the vote to proceed anyway, even if one of the Senators presented the Lieutenant Governor with a petition showing eleven votes against the measure. Mr. Dewhurst did not state that, in such a situation, he would not honor the two-thirds rule; he merely indicated that he would allow the vote to proceed.
6. I understood from Mr. Dewhurst's statements in the meeting that his stated intent was to honor the two-thirds rule, even in the "close vote" situation he had described. This remained my understanding when the time came to vote on the Senate rules for the 78th Texas Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 26th day of August, 2003.

Leticia Van de Putte

LETICIA VAN DE PUTTE

VERIFICATION

STATE OF NEW MEXICO §
COUNTY OF Bernalillo §

Before me, the undersigned notary, on this day appeared LETICIA VAN DE PUTTE, a person whose identity is known to me. After I administered an oath to her, upon oath she said that she has read the Declaration and the facts stated in it are within her personal knowledge and are true and correct.

Leticia Van De Putte

Sworn to and subscribed before me by Leticia Van De Putte on August 26, 2003.

Notary Public in and for the
State of New Mexico

My Commission Expires: 11/21/2006